



An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Public Consultation on the transposition of Directive (EU) 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches

Response Template

As set out in the consultation, the Department of Enterprise, Trade and Employment is specifically seeking views on the Member State options provided in Articles 48c(6) and 48d(3) of Directive 2021/2101.

Respondents have the opportunity to comment generally on the Directive at the end of the template and express any views on other specific articles of the Directive should they wish.

Please include your response in the space underneath the relevant option, to set out/ explain your views. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

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Respondents are requested to return their completed templates by email to companylawconsultation@enterprise.gov.ie by the closing date of **Friday 18 February 2022**

Hardcopy submissions are not being received at this time due to remote working.

Please mark your submission as 'response to Public Consultation on the Transposition of Directive (EU) 2021/2101'.

Article 48c (6) – Content of the Report on tax information

Member States may allow for one or more specific items of information otherwise required to be disclosed in accordance with paragraph 2 or 3 to be temporarily omitted from the report where their disclosure would be seriously prejudicial to the commercial position of the undertakings to which the report relates. Any omission shall be clearly indicated in the report together with a duly reasoned explanation regarding the reasons therefor.

Member States shall ensure that all information omitted pursuant to the first subparagraph is made public in a later report on income tax information, within no more than five years of the date of its original omission.

Question – Do you consider that Ireland should take the option to allow for one or more specific items of information, otherwise required to be disclosed to be temporarily omitted from the report, when their disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates?

Please give reasons for your preference.

Following Ireland's commitment to the OECD base erosion and profit shifting (BEPS) project and the transposition of the EU Anti-Tax Avoidance Directives, ATAD1¹ and ATAD2² into Irish law, extensive reforms have been implemented in domestic legislation over recent years to eliminate BEPS opportunities and to prevent aggressive tax planning. It is in the context of these existing protections in the Irish tax code that policymakers must consider whether it is appropriate to adopt the option permitted under the Directive (EU) 2021/2101 to allow in-scope undertakings to temporarily omit the disclosure of information which would be seriously prejudicial to the commercial position of the undertaking.

It is important that the objective of the Directive (EU) 2021/2101, of increasing corporate transparency, is achieved when transposing the Directive. However, we consider this objective must be balanced with the need to protect against the disclosure of commercially sensitive information. Otherwise, the measure could result in unfair competition for undertakings within the scope of the Directive (EU) 2021/2101 compared with businesses which are out of scope.

In our view, Ireland should avail of the option to allow information to be temporarily omitted for a period of up to five years from the report on tax information where its disclosure would be seriously prejudicial to the commercial position of the undertaking.

Although the title of the Directive (EU) 2021/2101 states that it concerns "*the disclosure of income tax information*", the information required to be disclosed under the Directive also includes non-tax information, such as profit or loss before tax of in-scope businesses in each Member State. Currently, such information would not generally be publicly available and therefore, its disclosure may have significant commercial implications for many groups.

¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

² Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

The original intention of country-by country reporting was to provide tax administrations with information to assess transfer pricing risks. Notably, the BEPS Action 13 Report on Transfer Pricing Documentation and Country-by-Country Reporting recognised the importance of protecting commercially sensitive information stating that “*Tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information contained in the documentation package (master file, local file and Country-by-Country Report).*”³

While the Directive (EU) 2021/2101 envisages public country-by-country reporting as a means of enhancing public scrutiny of corporate income taxes, it also recognises that “*public scrutiny should be conducted without harming the investment climate in the Union or the competitiveness of Union undertakings*”. Therefore, in transposing the Directive (EU) 2021/2101 into Irish law, policymakers should ensure that it does not potentially harm the competitive position of in-scope undertakings.

The Directive (EU) 2021/2101 provides that any omission of commercially sensitive information would be temporary and it requires the undertaking availing of the option to clearly indicate this on the report and provide a duly reasoned explanation. In these circumstances, we consider it reasonable that an undertaking should have the option to temporarily delay the disclosure of commercial sensitive information.

The need to protect commercially sensitive information from disclosure is recognised in the context of the exchange of information on cross-border rulings. Revenue’s guidance on its arrangements for implementing EU and OECD exchange of information requirements in respect of tax rulings (Tax and Duty Manual, Part 35-00-01) notes, that in line with Article 17(4) of the Council Directive 2011/16/EU, Revenue will not provide information regarding a taxpayer that would lead to the disclosure of commercial, industrial or professional secrets or of a commercial process, or of information the disclosure of which would be contrary to public policy to other Member States.

Adopting the option permitted under the Directive would also be in line with the approach taken in other areas of Irish legislation concerning transparency matters. For example, Section 36 of the Freedom of Information Act 2014, provides for the refusal of disclosure of information which “*could prejudice the competitive position of that person in the conduct of his or her profession or business*” or “*information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.*”

In our view, the decision as to whether the disclosure of the information would be seriously prejudicial should be a matter for the directors of a company, as they are best placed to make this decision. Indeed, there is precedent for such an approach in the provisions of the Companies Act 2014 concerning the disclosure of information in accounts regarding the particulars of the turnover of a company and also in respect of amounts expended on research on development.⁴

³ OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, at paragraph 44.
<http://dx.doi.org/10.1787/9789264241480-en>

⁴ Schedule 3, Accounting Principles, Form and Content of Entity Finance Statements, Companies Act 2014

The disclosure of detailed information is required except where, in the opinion of the directors, the disclosure of such information would be seriously prejudicial to the interests of the company. In these circumstances, information need not be disclosed, but the fact that any such information has not been disclosed must be stated in the accounts.

Article 48d (3) – Publication and accessibility

Member States may exempt undertakings from applying the rules set out in paragraph 2 of this Article where the report on income tax information published in accordance with paragraph 1 of this Article is simultaneously made accessible to the public in an electronic reporting format which is machine-readable, on the website of the register referred to in Article 16 of Directive (EU) 2017/1132, and free of charge to any third party located within the Union. The website of the undertakings and branches, as referred to in paragraph 2 of this Article, shall contain information on that exemption and a reference to the website of the relevant register.

Question – Do you consider that Ireland should take the option to exempt undertakings from the publishing requirement, where the report is simultaneously made accessible to the public on the website of the CRO and free of charge to any third party located in the European Union?

Please give reasons for your preference.

The Directive (EU) 2021/2101 provides that the option to exempt undertakings from publishing the report on their website is subject to the condition that the report is simultaneously made accessible to the public on the Companies Registration Office (CRO) website and is free of charge to any third party located in the EU. An undertaking availing of this exemption would also be required to include on its own website, information regarding the exemption and a reference to the CRO website.

Given the strict criteria which would apply should an undertaking avail of this option, the value of the exemption, to either the undertaking availing of it or to a third party wishing to access the report of the undertaking, is unclear.

However, in our view, given that the exemption does not in any way detract from the corporate transparency which the Directive is seeking to achieve, we consider that the option to avail of the exemption should be included in Irish legislation.

Please indicate any general comments you may have.

We have no further comments at this time on the transposition of the Directive (EU) 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.